90-615

No.: _____

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

October Term, 1990

RAFAEL PERETZ

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Does this Court's decision in *Gomez v. United States,* 109 S.Ct. 2237 (1989), which held that a federal magistrate lacks jurisdiction to preside at jury selection for a felony trial, and that a magistrate's general criminal trial jurisdiction requires a defendant's knowing, voluntary and written consent, mandate reversal of a conviction where the defendant neither consented nor objected to such an unauthorized procedure?

2. Does a federal felony defendant waive his personal right to trial before a tribunal with jurisdiction to preside merely by failing to object, where Congress has expressly required that such waivers be unequivocal, knowing, voluntary and written?

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No.:_____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term: 1990

RAFAEL PERETZ,

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-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PRELIMINARY STATEMENT

Petitioner, Rafael Peretz, respectfully requests that a Writ of Certiorari be issued to review a judgment and opinion of the United States Court of Appeals for the Second Circuit entered in the above-captioned proceeding on April 23, 1990.

The Court rejected petitioner's arguments that reversal of his conviction was required by this Court's decision in *Gomez v. United States,* 109 S.Ct. 2237

(1989), and that neither his failure to object nor the "consent" of his trial counsel constituted a waiver of his right to raise that claim.

OPINIONS BELOW

The United States District Court for the Eastern District of New York (Sifton, J.), wrote no opinion. The opinion of the United States Court of Appeals for the Second Circuit affirming appellant's conviction is reported at 904 F. 2d 34 (2d Cir. 1990), and is reprinted in the Appendix hereto at p. 1a; the opinion of the Court of Appeals denying rehearing and rehearing *en banc* is not officially reported, and is reprinted in the Appendix hereto at p. 5a.

JURISDICTION AND TIMELINESS

This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. Section 1254(1). This petition is timely because filed within 90 days of the Court of Appeals' denial of petitioner's timely petition for rehearing on July 11, 1990.

STATUTES INVOLVED

Title 28, United States Code, Section 636 (in pertinent part):

> Section 636. Jurisdiction, powers, and temporary assignment.
>
> (a) Each United States magistrate serving under this chapter shall have within the territorial

> jurisdiction prescribed by his appointment ---
>
> * * *
>
> (3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section.
>
> (c) Notwithstanding any provision of law to the contrary ---
>
> > (1) Upon the consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves ....
> >
> > (2) If a magistrate is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of their right to consent to the exercise of such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, neither the district judge nor the magistrate shall attempt to persuade or induce any party to consent to reference of any civil matter to a magistrate. Rules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties' consent.

Title 18, United States Code, Section 3401 (in pertinent part):

> Section 3401. Misdemeanors; application of probation laws.
>
> (a) When specially designated to exercise such jurisdiction by the district court or courts he serves, any United States magistrate shall have jurisdiction to try persons accused of, and sentence persons convicted of, misdemeanors committed within that judicial district.
>
> (b) Any person charged with a misdemeanor may elect, however, to be tried before a judge of the district court for the district in which the offense was committed. The magistrate shall carefully explain to the defendant that he has a right to trial, judgment, and sentencing by a judge of the district court and that he may have a right to trial by jury before a district judge or magistrate. The magistrate shall not proceed to try the case unless the defendant, after such explanation, files a written consent to be tried before the magistrate that specifically waives trial, judgment, and sentencing by a judge of the district court.

STATEMENT OF THE CASE

Indictment 88 Cr. 434 (E.D.N.Y.) charged petitioner with violations of the controlled substances provisions of federal law.

Prior to trial, at an informal status conference, Judge Sifton asked whether there was any objection to pick the jury before a magistrate, and defense counsel responded "I would love the opportunity." Prior to beginning the jury selection process, Magistrate Amon asked petitioner's counsel if his client consented to having her select the jury, and counsel answered affirmatively. Neither before Judge Sifton nor Magistrate Amon was petitioner personally addressed nor did he personally respond.

After the Magistrate conducted the jury selection, Judge Sifton swore the panel without offering petitioner a *de-novo* review of the Magistrate's conduct of the proceeding. After a brief trial, the Magistrate-selected jury returned a verdict of guilty against petitioner. Petitioner then filed a motion to set aside the verdict on the basis of this Court's just-rendered decision in *Gomez*. However, the motion was orally denied (without a formal opinion) and petitioner was sentenced to eleven and one-quarter years in prison (which sentence he is presently serving).

On appeal, petitioner argued that *Gomez* mandated a new trial and that his failure to object to the Magistrate selecting the jury did not waive his right to make that argument on appeal.

The Court of Appeals held (1) that petitioner's failure to object was not excused by prior Court of Appeals' case-law (*United States v. Garcia,* 848 F. 2d 1324 (2d Cir. 1988), rev'd. sub. nom. *Gomez v. United States,* 109 S.Ct. 2237 [1989]) holding that magistrates had the authority to select juries with or without a

defendant's consent, citing *United States v. Musacchia,* 900 F. 2d 493 (2d Cir. 1990), and (2) that petitioner's failure to object constituted a waiver of his right to request reversal under *Gomez*, citing *United States v. Mang Sun Wong,* 884 F. 2d 1537 (2d Cir. 1989).

Petitioner sought rehearing and rehearing en banc on the ground that both *Musacchia* and *Mang Sun Wong* were in conflict with decisions of other Courts of Appeals such as *United States v. France,* 886 F. 2d 223 (9th Cir. 1989). However, the petition was denied without opinion.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUITS AS TO WHETHER A DEFENDANT, VIA VERBAL "CONSENT" AND/OR A FAILURE TO OBJECT, (A) MAY EMPOWER A MAGISTRATE TO CONDUCT JURY SELECTION AND/OR (B) WAIVES HIS PERSONAL RIGHT TO RAISE SUCH ISSUE.

This Court recently granted Certiorari and heard oral argument in connection with the decision in *United States v. France, supra,* which decided both of the above stated issues in petitioner's favor and contrary to the decision of the Second Circuit in this case. This Court's decision in *France* will, therefore, finally resolve this issue.

CONCLUSION

FOR THE FOREGOING REASONS, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED AND THE JUDGMENT OF THE COURT OF APPEALS SUMMARILY REVERSED UNDER *GOMEZ V. UNITED STATES*. ALTERNATIVELY, THE MATTER SHOULD BE SET DOWN FOR FULL BRIEFING AND ORAL ARGUMENT. AT THE LEAST, THE PETITION SHOULD BE HELD PENDING THE DECISION IN *UNITED STATES V. FRANCE*.

Respectfully submitted,

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Dated: East Northport, New York
October 5, 1990

APPENDICES

Appendix A
Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-third day of April, one thousand nine hundred and ninety.

Present:

Honorable James L. Oakes,
Honorable Ralph K. Winter,
Circuit Judges,
Honorable Michael B. Mukasey,*
District Judge.

UNITED STATES OF AMERICA,
Appellee,

v.

RAFAEL PERETZ,
Defendant-Appellant.

ORDER # 89-1543

Appeal from the United States District Court for the Eastern District of New York.

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* The Honorable Michael B. Mukasey, United States District Judge for the Southern District of New York, sitting by designation.

Appendix A
Opinion of United States Court of Appeals

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the petition is denied and the judgment of said District Court be and it hereby is affirmed.

Appellant argues that his affirmative consent in the district court to jury selection before a magistrate should not now preclude his claim on appeal that such selection was constitutionally infirm under the Supreme Court's recent holding in *Gomez v. United States,* 109 S. Ct. 2237 (1989). This court has held in the aftermath of *Gomez* that explicit consent by a defendant to magistrate-supervised *voir dire* waives any subsequent challenge on those grounds. *See United States v. Mang Sun Wong,* 884 F.2d 1537, 1546 (2d Cir. 1989) (on petition for rehearing), *cert. denied,* 110 S.Ct. 1140 (1990). Appellant attempts to distinguish *Wong* on the ground that, unlike the jury there, his jury was empaneled after our decision in *United States v. Garcia,* 848 F.2d 1324, 1332 (2d Cir. 1988), *rev'd. sub. nom. Gomez v. United States,* 109 S.Ct. 2237 (1989), upholding delegation of *voir dire* to a magistrate over the defendant's objection. In light of *Garcia,* he argues, it would have been "futile" to object, and furthermore,

Appendix A
Opinion of United States Court of Appeals

consent was, under the circumstances, effectively indistinguishable from silent acquiescence. However, our recent decision in *United States v. Musacchia,* Nos. 88-1491, 88-1495, slip op. at 6805 (2d Cir. Mar. 21, 1990), completely forecloses this argument. There we rejected a similar futility argument raised by defendants who had merely failed to object to magistrate-led selection, but had not affirmatively consented. *See id.* at 6823-24. The reasoning of that decision therefore applies with even greater force to the situation presented here.

Neither of appellant's other claims of error requires reversal. He waived his lack of probable cause claim by failing to seek suppression of the evidence in question under Fed. R. Crim. P. 12. The admission of the items and statements obtained at the arrest was certainly not so plain an error as to amount to a miscarriage of justice. *See United States v. Young,* 470 U.S. 1, 16 (1985). With regard to the insufficiency claim, appellant's reliance on *United States v. Nusraty,* 867 F. 2d 759 (2d Cir. 1989), is misplaced. Unlike *Nusraty,* this case rested on far more than appellant's "mere presence" at the airport. Although the evidence against him was largely circumstantial, it was considerable and more than sufficient in light of the burden facing an appellant seeking to overturn a jury verdict on sufficiency grounds. *See, e.g., United States v. Roman,* 870 F.2d 65, 71 (2d Cir.), *cert. denied,* 109 S. Ct. 3164 (1989).

Appendix A
Opinion of United States Court of Appeals

Affirmed.

HON. JAMES L. OAKES

HON. RALPH K. WINTER,
Circuit Judges

HON. MICHAEL B. MUKASEY,
District Judge.

N.B. This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

Appendix B

Order of United States Court of Appeals On Petition for Rehearing With Suggestion For Rehearing In Banc

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the eleventh day of July, one thousand nine hundred and ninety.

UNITED STATES OF AMERICA,
Appellee,

-v-

RAFAEL PERETZ,
Defendant-Appellant.

Docket No.: 89-1543

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Defendant-Appellant RAFAEL PERETZ.

Upon consideration by the panel that heard the appeal, it is

Appendix B
Order of United States Court of Appeals
On Petition For Rehearing With Suggestion For
Rehearing In Banc

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk